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Freedom of Navigation: New Strategy for the Navy's FON Program

by

James K. Greene
Lieutenant Commander, United States Navy

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: James K. Greene

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The United States remains a non-signatory of the 1982 United Nations Law of the Sea Convention (USCLOS), yet strongly supports the navigational causes contained therein. The Freedom of Navigation program is designed to peacefully assert U.S. rights on and over the high seas, as well as guarantee rights of transit and innocent passage. Although the FON program has been successful to date, it requires a few fundamental changes before it can continue to be a visable tool for assuring our maritime rights into the 21st century.

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ABSTRACT OF

Freedom of Navigation:
New Strategy for the Navy's FON Program

Although the United States remains a non-signatory of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the U.S. strongly supports, and adheres to, all portions of the Convention regarding navigation on and over the high seas, rights of innocent passage through territorial seas, and rights of transit passage through international straits. The U.S. Freedom of Navigation (FON) program is designed to exercise those rights and ensure that customary adherence to excessive sea claims do not, by default, become international law. Implementation of the FON program has been successful, but leaves considerable room for improvement. Much of the FON program remains classified which has, more than once, led to a misunderstanding of what the FON program is trying to accomplish. Many naval commanders are unsure of rights afforded on the high seas under international law and have made unnecessary allowances to be safe, or made unlawful infringements and have certainly been sorry. The Navy often gives these contested waters a wide berth, unless specifically participating in a FON program, thereby supporting the excessive claim through acquiescence. The Navy must correct the deficiencies of the FON program by lifting the veil of secrecy surrounding the program, educating its officers of their rights under international law, and ensuring that routine operations do not undermine what the program is trying to achieve.

PREFACE

Despite (or perhaps because of) the classification of the Freedom of Navigation program, challenges made to excessive sea claims are well documented and, with proper clearance, readily available. Part of the premise of this paper, however, concludes that irrespective of the "use it or lose it" aspect of the customary principles behind international law, the U.S. Navy expends far more effort avoiding contested waters than challenging them. It is the author's 13 years of operational experience (coincident with the FON program) that unless specifically operating in a FON exercise, U.S. Navy ships and aircraft are often steered well clear of "buffer zones" which are themselves self-imposed extensions of these excessive claims. Unfortunately, it is virtually impossible to document the countless times that U.S. Navy units sidestep claimed territorial limits and deprive themselves of their rightful use of the high seas and international airspace. This action ultimately supports the excessive claims by acquiescence and undermines the very purpose of the FON program.

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INTRODUCTION & BACKGROUND

For decades, coastal states considered three nautical miles as the limit of their territorial seas. After 1930 (coincident with the Hague Convention of 1930)[1], states began making increasingly larger claims as to the breadth of their territorial waters. "Three kinds of reasons - security (strategic and military), economic and environmental have prompted moves to extend seaward limits."[2] Eventually, some of these excessive claims reached beyond 200 miles. Recognizing that these excessive claims might severely limit the operational flexibility of our armed forces on and over the high seas, the United States began challenging excessive sea claims around the world. In 1979, during negotiations for the United Nations Convention on the Law of the Sea (UNCLOS), the Carter Administration established a formal Freedom of Navigation (FON) program for making periodic challenges to excessive claims. The FON program is jointly administered by the Department of State and the Department of Defense, and implemented by the U.S. Navy. Since its inception, the FON program has made over 300 specific challenges to excessive territorial sea claims of more than 40 nations.[3] The vast

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[1]Tommy T.B. Koh, "Negotiating a New World Order for the Sea," ***Virginia Journal of International Law***, Summer 1984, pp. 763-764.

[2]Clyde Sanger, ***Ordering the Oceans***, (Toronto: University of Toronto Press, 1987), p. 56.

[3]Colonel W. Hays Parks, "Crossing the Line," ***U.S. Naval Institute Proceedings***, November 1986, p. 43.

majority of these assertions go unnoticed or unprotested, yet a handful of the challenges, most notably Libya, have been extremely volatile.

The importance for the United States to maintain its freedom of movement on the high seas and right of passage through territorial seas and international straits cannot be overstated. "Naval forces are particularly effective in deterring potential aggression because they have the flexibility and mobility to respond, worldwide, to crisis situations and to do so without the political entanglement that can accompany the insertion of military forces into foreign territory."[4] In short, the naval commander's ability to operate without restrictions on the high seas and through international straits will always remain a vital national interest.

The FON program was designed to challenge any nation's attempt to extend their domain of the sea beyond that afforded them by international law. But, after 12 years, is the FON program working as well as it should? Probably not. There are three areas of concern that diminish those returns gained by the FON program as it is now implemented:

1. The FON program is unnecessarily classified. Maintaining secrecy of a program that is designed simply to assert

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[4]Richard J. Grunawalt, "United States Policy on International Straits," *Ocean Development and International Law*, Volume 18, Number 4, 1987, p. 447.

our rights under international law hints of an additional clandestine reason for that program's existence.

2. Better education is required. The FON program operates within the auspices of international law, yet the government officials who administer the program and the navy officers who implement the program are not always clear about the rights the FON program is designed to protect.

3. Challenges should become more routine. Avoiding contested waters in all cases *except* FON exercises provides the acquiescence that can ultimately lead to losing the rights of passage that the FON program was designed to protect.

These three concerns will be discussed in detail after providing a quick background on international law and the United Nations Convention on the Law of the Sea. This background is by no means designed to be a complete discussion of these topics, but is meant to provide the reader a better foundation for understanding what direction the FON program needs to steer into the 21st century.

International Law

> For the past several centuries the world's oceans have been predominantly governed by two fundamental principles. First the oceans can be used by all, for any peaceful purpose, short of a national claim to sovereignty. The only limitation to this principle, described as "freedom of the seas," is that the activity must be undertaken with reasonable regard for similar rights of other users.[5]

Naval officers are rarely students of international law, yet they operate around the world as representatives of their government, a government which places high regard on complying with international law. ***The Commander's Handbook On the Law of Naval Operations*** (NWP 9) provides the following brief discussion of international law:

> ...international law is defined as that body of rules that nations consider binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements. International law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. If one nation violates the law, it may expect that others will reciprocate. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. In short, nations comply with international law because it is in their interest to do so. Like most rules of conduct, international law is in a continual state of development and change.[6]

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[5]Bruce Harlow, ***Mission Impossible? Preservation of U.S. Maritime Freedoms***, University of Washington, 16 May 1985, p. 1.

[6]U.S. Office of Chief of Naval Operations, ***The Commander's Handbook on the Law of Naval Operations***, NWP 9 (Washington: July 1987), p. 2.

International law of the high seas has evolved over the years based on accepted and agreeable practices of nations. "It is generally held that usage becomes an international legal norm when it has been repeated over a period of time by several states, when they have generally acquiesced in such behavior by one another, and when governments begin to act in certain ways out of a sense of legal obligation."[7] Customary acceptance of the practice of nations, over time, results in international law and is binding on all nations.

The United States is determined not to concede, through acquiescence, either excessive territorial sea claims made by other states, or the freedom to transit international straits. "The rights and freedoms of the sea will be lost over time if they are not used."[8] Customary law, then, is the primary motivation for the existence of the FON program.

United Nations Convention for the Law of the Sea

Whether territorial sea limits were influenced by the cannon-shot rule, line-of-sight doctrine, or adoption of the Scandinavian marine league, the three-mile territorial sea was almost

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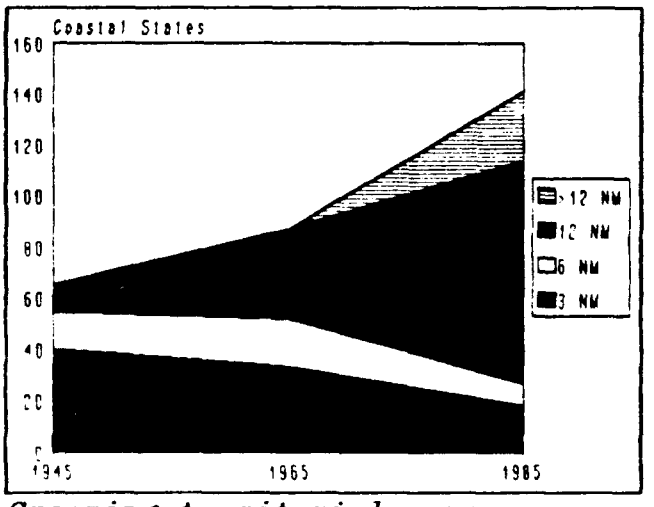
[7]Walter S. Jones, *The Logic of International Relations*, (Boston: Little, Brown & Company, 1985), p. 493.

[8]John D. Negroponte, "Who Will Protect Freedom of the Seas?," *Current Policy*, No. 855, July 1986, p. 2.

universally accepted by the end of the Napoleonic Wars in the early nineteenth century.[9] As a maritime nation, the United States has long supported the three-mile territorial sea for fear that extending this limit would unnecessarily regulate or restrict access to international straits. Conflicting territorial sea claims, potential closure of international straits, and increased awareness of the economic treasures contained in and under the sea compelled nations to try and codify international law of the high seas.

The United Nations held two Law of the Seas conferences (1958 and 1960) which provided no relief to the issue of creeping jurisdiction, emphasizing the wide divergence among member states' positions on territorial sea issues. A third U.N. Law of the Sea conference began in 1973 with hopes of finally settling, among others, the territorial sea issue. By UNCLOS III, the problem of creeping territorial seas was exacerbated by the ever-increasing number of coastal states that now made up the world community. The chart to the right shows the dramatic increase since World War II of newly independent coastal states and their claimed breadth of territorial seas.



Creeping territorial seas

[9]Koh, pp. 762-763.

It was clear that the former three mile limit might be increased to twelve miles which caused considerable concern for the United States Navy. "Since an increasing number of straits would fall under overlapping territorial seas of the coastal states if the territorial sea is extended from three to six or twelve miles, a relevant question from a navy point of view was whether warships have a right of innocent passage."[10] Of course innocent passage was not the answer the navy was looking for anyway, for the 1958 convention cited: "Submarines are required to navigate on the surface and show their flag" in territorial seas, under innocent passage.[11] The United States, therefore, maintained its position on the following three issues with respect to routine navigation:

1. U.S. surface, sub-surface and air units could enjoy traditional high seas rights in ocean areas beyond 12 miles from foreign shores,

2. Such units could exercise similar rights for the purpose of navigating on, under, or over international straits, and

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[10]Finn Laursen, ***Superpower at Sea***, (New York: Praeger Publishers, 1983), p. 33.

[11]Ibid.

3. Surfaced units could engage in innocent passage in territorial seas generally.[12]

If all 141 coastal states were to extend their territorial seas out to 12 nautical miles, an estimated 135 international straits six nautical miles or more in breadth would be overlapped by territorial seas.[13] Transit of international straits, then, was the key issue, and the United States was not alone on this matter. The Soviet Union, by this time possessing a blue-water navy, was also interested in maintaining certain freedoms on the high seas, particularly with regard to its huge submarine force. "The superpowers made unimpeded passage through straits their single non-negotiable demand in the Law of the Sea Conference."[14] UNCLOS III negotiations were finally completed in 1982, fixing the maximum breadth of the territorial sea at 12 nautical miles.[15] The rights of innocent passage on the high seas were preserved[16] and the issue of passage through international straits was resolved by

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[12]Harlow, p. 5.

[13]David L. Larson, "Innocent, Transit, and Archipelagic Sea Lanes Passage," *Ocean Development and International Law*, Volume 18, Number 4, p. 414.

[14]Sanger, p. 83.

[15]United Nations Conference on the Law of the Sea, 3d, ***Law of the Sea: United Nations Convention on the Law of the Sea***, (UNCLOS), (New York: 1983), Art. 3, p. 3.

[16]Ibid., Arts. 17-26, pp. 6-9.

introducing a new notion called "transit passage".[17]

Transit passage turned out to be the necessary compromise in widening territorial seas while preserving the previous "high seas" status enjoyed in all international straits.

> The Convention recognizes twelve miles as the maximum permissible breadth of the territorial sea. At the same time, it prescribes a special regime, called transit passage, for ships and aircraft through and over straits used for international navigation. The Convention uses the words "freedom of navigation and overflight" to describe the nature of transit passage. It is significant that these are words that are normally used in connection with the high seas. The regime of transit passage is applicable to warships as well as to military aircraft. Submarines may also transit a strait used for international navigation in submerged passage.[18]

In general, the U.S. achieved what it wanted in terms of navigational rules from UNCLOS III, yet refused to become a signatory of the Convention because of opposition to the deep seabed mining Articles. Nations have accused the U.S. of "picking and choosing" among the UNCLOS Articles, claiming the U.S. wants to benefit from the rights afforded them by transit passage without parallel acquiescence to the provisions on deep seabed mining. These nations continue to argue that transit passage is not customary law, but rather part of the UNCLOS code, and therefore not a right that should be granted to non-signatories of the Convention.

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[17] Ibid., Arts. 37-44, pp. 12-14.

[18] Koh, p. 769.

> Some states take the position that the provisions of all parts of the convention are closely interrelated; that they were negotiated as, and therefore, form, an integral package. This school of thought holds that states not willing to accept the deep seabed mining articles of the convention cannot avail themselves of the navigational articles [transit passage]. This argument is pointedly directed at the decision of the United States not to sign or ratify the convention because what it perceives as fatal flaws in the deep seabed mining articles.[19]

A compelling argument, yet the U.S. maintains that international straits have always been treated by most nations as high seas, so transit passage should be considered as customary law accordingly. Nevertheless, there are a significant number of 'have-nots' among the newly independent coastal states that will continue to insist that the articles of UNCLOS III constitute a package deal: "For many countries of the world, claims to the oceans may be one of the few political bargaining chips they have in a high-stakes game of international politics."[20] Until a Law of the Sea treaty is accepted as international law by all states, this controversy will continue. In the meantime, a viable FON program remains the most important vehicle for asserting and maintaining U.S. maritime rights.

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[19]Grunawalt, p. 457.

[20]John Gamble, Jr., "Where Trends the Law of the Sea?" ***The Law of the Sea in the 1980s*** (Honolulu: Law of the Sea Institute, University of Hawaii, 1983), p. 22.

Post-UNCLOS III

Among the industrialized countries only the United States, Britain and West Germany did not sign [UNCLOS III] before the December 1984 deadline.[21] By the end of 1991, only 51 nations had ratified the Convention, none of which could be considered a major maritime power. I have already discussed the ensuing argument from coastal states who believe that non-signatories should not benefit from UNCLOS III and the U.S. response that navigational rights exist as a result of customary law, not UNCLOS III. Where does the U.S. stand in the international community as a non-signatory of UNCLOS III? Brian Hoyle, Deputy Director of the Office of Ocean Law and Policy, Department of State stated:

> The United States considers itself to be bound by the existing customary and conventional international law of the sea. We are not bound by the 1982 LOS Convention. Indeed, no other nation is bound by the 1982 convention today nor does any other nation derive any rights from the 1982 convention today. Rights and duties cannot derive from a treaty that has not entered force.[22]

As stated earlier, customary law provides the primary impetus for the existence of the FON program. Although UNCLOS III took important steps to settle the confusion surrounding conflicting

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[21]Sanger, p. 5.

[22]Brian Hoyle, "Benefits of Not Participating in the Treaty," ***The United States Without the Law of the Sea Treaty: Opportunities and Costs***, (Wakefield, Rhode Island: Times Press, 1983), p. 71.

territorial sea claims around the world, there still remains a danger of losing freedom on the high seas should the general practice of nations acquiesce those rights in the face of excessive claims. "Deference to coastal states in the exercise of rights will only make it more difficult to exercise the right in the future, since the political cost of using the right will increase in the absence of usage."[23]

Despite the aversion to the deep seabed mining provisions, the Reagan Administration did support the territorial sea and navigational compromises made by UNCLOS III. But until there was agreement by all nations, this support also meant continued implementation of the FON program, with the President committing the United States to recognize:

> ...the rights of other states so long as the rights and freedoms of the United States and others under international law are recognized. Moreover, the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the Convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight...[24]

Because of the Soviet Union's support at the convention regarding the navigation articles, it came as some surprise to the U.S. that the Soviet Union's definition of innocent passage was

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[23]Negroponte, p. 2.

[24]U.S. President, "Statement on United States Ocean Policy," *Weekly Compilation of Presidential Documents*, 10 March 1983, no. 383.

entirely different than our own. Soviet writers have claimed that coastal states may designate routes through their territorial seas and to show that passage is indeed "innocent", warships are obliged to follow those routes. "The Soviet view - where there are no designated routes there is no innocent passage for warships - has no basis in customary international law, and is a gross departure from the principles supported by the United States and the Soviet Union and accepted by UNCLOS III. Attempts to restrict foreign warships to a few designated routes unlawfully hamper - indeed, can all but preclude - innocent passage."[25]

Now that ten years have elapsed since UNCLOS III was opened for signature, it is clear that there is still a requirement for the United States to continue asserting its rights as granted by customary law. Failure to have the requisite number of nations ratify the Convention puts renewed significance on the customary aspect of international law. UNCLOS III has served to slow the proliferation of excessive maritime claims and has laid the foundation for the maintenance of international straits in future Law of the Sea debates. However, the creation of 200 mile Exclusive Economic Zones (EEZ) has served to put more and more of the high seas in the hands of negotiators. "The lasting effect of UNCLOS III will be to ensure that to a greater extent than ever before, the sea will be conceived as an extension of the land. The growth of

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[25]Lieutenant Commander Ronald D. Neubauer, "The Rights of Innocent Passage for Warships in the Territorial Sea: A Response to the Soviet Union," ***Naval War College Review***, Spring 1988, p. 55.

national and in some cases international control of the seas will be a future fact of the maritime environment."[26]

The significant gains made by UNCLOS III and the ultimate failure of its ratification, due primarily because of U.S. refusal to sign, means that there will ultimately be UNCLOS IV. It is imperative that the U.S. continue to assert its rights in the spirit of UNCLOS III on the high seas, in international straits, and in territorial seas. This will help ensure that naval mobility cannot be bargained away in the future.

FREEDOM OF NAVIGATION PROGRAM: PAST

The Freedom of Navigation program has existed for over 12 years and endured three administrations, one Democrat and two Republican. Each year the State Department prepares a target list of those nations making excessive territorial sea claims and confers with the U.S. Navy about which nations on the list will be subject to a challenge during that operational year. The Navy usually has a free hand in how it will implement the program, except where politically sensitive areas (PSA) are concerned... in those cases the State Department requires prior coordination.

Although there have been hundreds of FON program challenges since the program's inception, only a handful have created any

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[26]Ken Booth, ***Law, Force and Diplomacy at Sea***, (London: George Allen & Unwin, 1985), p. 37.

interest beyond the immediate circle of the State Department and the Navy. The most notorious FON assertions were made in the Gulf of Sidra in 1981, 1986 and 1989, and in the Black Sea in 1988.

Libya claims the Gulf of Sidra as a historic bay which would, if accepted, preclude even innocent passage through those waters. "In attempting to declare the Gulf of Sidra part of Libya's internal waters, Ghadafi was endeavoring to prevent surveillance of his arms buildup."[27]

Repeating the details of the Gulf of Sidra incidents is beyond the scope of this paper; suffice it to say that the Libyans received a bloody nose to the tune of two Su-22 aircraft in 1981, a couple of Nanuchka patrol boats in 1986, and two MiG-23 aircraft in 1989.[28] Critics of the Gulf of Sidra FON operations believe that the U.S. was simply setting a well-engineered and provocative trap for Ghadafi, who was clearly a thorn in America's side. "President Reagan himself insisted that it had not been the U.S. intention to be provocative; he said that U.S. warships had simply been doing what had been done elsewhere, and what was normally done by the warships of other nations, namely, assuring that 'everyone is observing international waters and the rules pertaining to them'."[29]

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[27]Parks, p. 42.

[28]For an excellent account of the 1981 and 1986 FON operations, see Colonel W. Hays Parks, "Crossing the Line," ***U.S. Naval Institute Proceedings***, November 1986, pp. 40-52.

[29]Booth, p. 176.

As stated earlier, the United States and the Soviet Union agreed on most issues regarding use of the high seas and transit passage, but found their positions very different when it came to the rights of innocent passage. In February of 1988, *USS Yorktown* and *USS The Caron* were steaming in the Black Sea on a FON exercise designed to challenge the Soviet Union's claim stipulating warships were only permitted *along routes ordinarily used for international navigation.* [Emphasis added][30] The American warships entered into the claimed 12-mile territorial sea of the Soviet Union off the Crimean peninsula and were approached by a Soviet destroyer and frigate. The Soviet warships were sent to "prevent violations of territorial waters"[31] and the encounter ended after the Soviet vessels bumped the American ships. As it turns out, this bumping incident has proven to be one of the FON program's success stories as witnessed by the signing of an agreement between the United States and Soviet Union in 1989. The "Uniform Interpretation of the Rules of International Law" document indicates a significant modification in Soviet policy on the right of innocent passage of foreign warships in their territorial waters, a policy now in line with that of UNCLOS III.[32]

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[30]"Rules for Navigation and Sojourn of Foreign Warships in the Territorial Waters (Territorial Sea) of the USSR and the Internal Waters and Ports of the USSR," article 12(1).

[31]Lawrence Juda, "Innocent Passage by Warships in the Territorial Seas of the Soviet Union: Changing Doctrine," ***Ocean Development and International Law***, Volume 21, p. 112.

[32]Ibid.

Although there have been successes, the FON program as it is currently administered suffers from a few fundamental problems. "In order to reduce political friction with foreign states, the [FON] exercises are kept secret, thereby defeating to a large extent their purpose which is to announce loudly and clearly that the United States does not recognize the particular claim involved."[33] The secrecy associated with the program means that the public is only aware of the extremely rare occasions where U.S. forces become engaged in hostilities, such as the aforementioned Libyan incidents. Unfortunately, because all other peaceful challenges are not made a matter of public record, the FON program belies a sense of provocation. On the other hand, many challenges go completely unnoticed, even by the challenged nation. Do these assertions do any good? Perhaps it is analogous to the old question about a tree falling in the forest making noise if nobody is around to hear it.

The idea of establishing politically sensitive areas (PSA) and requiring State Department approval prior to a FON challenge is undoubtedly necessary. Unfortunately, this waves a red flag to the commander operating in the vicinity of a PSA to avoid that area like the plague. To help prevent an accidental excursion into the territorial waters of a PSA, the fleet commanders will often establish a buffer zone, sometimes 50 miles from the baseline, which all units are to avoid. To ensure that individual units do

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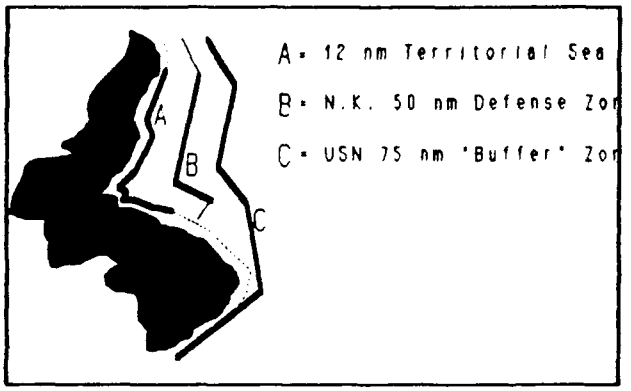
[33]Alberto R. Coll, "International Law and U.S. Foreign Policy: Present Challenges and Opportunities," *The Washington Quarterly*, Autumn 1988, p. 116.

not violate the fleet commander's buffer zone, a battle group commander may choose to add an additional 10 or 15 mile buffer zone. This is particularly evident when carrier battle groups with fast moving aircraft are involved and can accidently violate airspace quickly.

These self-imposed buffer zones represent the antithesis of the FON program and, unlike FON exercises which are generally very infrequent, the Navy acquiesces U.S. use of these waters on a daily basis. In the example to the right, using a 75 mile self-imposed buffer along a 200 mile coastal state, the Navy denies itself the legal right to over 12,000 square miles of the high seas. In so doing, the U.S. provides a dangerous precedent by establishing credibility to the excessive claims in the face of customary law.



PSA: North Korea - Typical U.S. acquiescence to excessive claims

FREEDOM OF NAVIGATION PROGRAM: FUTURE

> The benefit of defending an important legal principle must be weighed against the international ill will occasionally generated by such operations. The line between firmness and public pushiness, between assertion of rights and the appearance of superpower bullying, lies primarily in the eye of the beholder. If successful, the FON strategy will help to stabilize existing and nascent norms. If pushed too aggressively, however, FON

> operations also run the risk of creating a backlash that might accelerate rather than retard any pendulum swing toward further coastal state expansionism.[34]

Freedom to use the seas remains a national interest of the United States and must not be squandered or bargained away. For this reason, there *will* be a Freedom of Navigation program in our future. Hopefully, the U.S. can apply lessons learned to ensure a more viable program emerges for the remainder of the 1990's and into the 21st century. The rapidly changing political climate and "new world order" has put the United States further into the forefront as the only true global maritime nation. For that reason, we may have to "go it alone" to fight for our maritime rights in future Law of the Seas negotiations. In this light, the FON program takes on ever increasing importance in providing a basis for those future negotiations.

Declassify

Classification of the FON program has cast an unnecessary shadow on the program's legitimate purpose. Secrecy has made FON operations seem more provocative than they really are and give the appearance to the rest of the world that the U.S. is engaged in some sort of covert activity. "The exercise of rights - the freedom to navigate on the world's oceans - is not meant to be a

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[34]Stephen Rose, "Naval Activity in the Exclusive Economic Zone - Troubled Waters Ahead," *Ocean Development and International Law*, Volume 20, p. 135.

provocative act. Rather, in the framework of customary international law, it is a legitimate, peaceful assertion of a legal position and nothing more."[35]

Perhaps more importantly, secrecy hampers the program from achieving its ultimate goal by making it more difficult to establish, for the purposes of customary law, our routine use of the seas. "So long as challenges to objectionable [claims] go undetected or are left unpublished, they have little impact on reducing coastal nation expectations or influencing any rollback of excessive claims."[36]

Educate

Education, with respect to the FON program, falls into two categories: education of the public and education of the naval officer. Education of the public dovetails with my previous point; the public cannot become aware of the FON program unless it is declassified and becomes a part of the public record. Additionally, there are many public officials who need to become more cognizant of the objectives of the FON program and those international laws the FON program is trying to protect. In the aftermath of the Soviet "bumping incident" in the Black Sea, a misinformed U.S. State Department official explained that the U.S. warships were indeed spying on the Soviet Union, but that such action was well

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[35]Negroponte, p. 3.

[36]Rose, p. 134.

within their rights during innocent passage. Warships are not permitted to use their sensors (navigational safety being the only exception) while exercising their right of innocent passage. An erroneous official statement such as this can fatally undermine any progress made by the FON program.

Failure to educate the naval officer can have a far worse effect on the success of the FON program. Although violating the concept of innocent passage in another sovereign's territorial seas is much more politically damaging than avoiding those seas altogether, I have tried to show that acquiescence can be harmful as well. "A naval commander who diverts around another country's claimed territorial limits supports that country's claim by his acquiescence, perhaps in contradiction to stated U.S. policy. At the very least, such action may greatly complicate U.S. diplomatic maneuvering, especially if the ship diverts at the demand of the coastal state."[37]

The consequences of Naval officers not understanding international law can be disastrous beyond the realm of FON operations, but that is outside the scope of this paper. The point is that the current educational system for the naval officer inadequately prepares him or her for a career as a representative of national policy on the high seas.

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[37]Lieutenant Commander Paul M. Regan, "International Law and the Naval Commander," *U.S. Naval Institute Proceedings*, August 1981, p. 52.

> International law will affect naval planning, for almost all governments - at least for most of the time - are predisposed to observe it. But if this object is to be achieved, naval commanders need more guidelines, advice and information about their roles in the current period of international relations... International law is a useful tool of statecraft, and navies and naval officers can play their part in strengthening its norms.[38]

Routine

The end of the Cold War has given rise to the public demand for a "peace dividend". As a result, the defense budget is on a downward spiral. Global commitments, particularly for the Navy, have not diminished proportionally with the operating funds. Fortunately, the lack of a global blue-water threat (i.e., the former Soviet Union), means that the U.S. Navy need not operate in large carrier battle groups at *all times*. Budget restraints and a lower threat posture will lead to a higher propensity toward small surface action groups or single unit operations, meaning FON operations can (and should) become more routine. This, of course, points out the importance of my previous point: more naval commanders may find themselves working autonomously, requiring a better understanding of international law in the officer corps.

FON assertions need to become the rule rather than the exception. As navy commanders become more comfortable with their ability to operate near foreign shores, within the guidelines of international law, so will those nations become more comfortable

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[38]Booth, p. 204.

with the fact that the U.S. will not violate international law while near their shores.

The number of politically sensitive areas must be kept to an absolute minimum. I believe that as FON operations become more routine around the world, and the guidelines of UNCLOS III become the established rule, the number of sensitive areas will necessarily drop. As a welcome result, the CINC's may find that they will become more active participants in directing the movements of naval units in their own theater of operations.

There is no doubt that the State Department and the Navy must continue working together to establish goals and stipulations for FON operations. It is also clear that there will remain several PSA's for the next several years, with Libya and North Korea immediately coming to mind. In the meantime, however, the U.S. must stop adhering to self-imposed buffer zones which are dozens of miles from internationally agreed upon limits. And, when the political climate is right, we must continue FON assertions in those politically sensitive areas, eventually reducing the number of PSA's to zero.

CONCLUSION

> The United States should not give the impression that it cares little about international law or that it regards law as marginal to its foreign policy. A power that is perceived as generally abiding by the law and respectful of its legal commitments reaps useful, even if often intangible, political benefits from such a perception.

> Notions of morality and lawfulness, though not decisive, do exert some weight in the diplomatic and political processes of world politics.[39]

The United States cannot simply ignore creeping territorial claims on the basis that the most powerful navy in the world need not abide by the rules. The importance of maritime mobility to the United States is unquestionable. As treaties and conferences serve to regulate more of the world's oceans, freedom of navigation upon those oceans becomes more tenuous. The ultimate goal of the U.S. Freedom of Navigation program should be to arrive at the point where a FON program need no longer exist. The time for creeping territorial seas will stop and the rights of innocent and transit passage will be confirmed. When UNCLOS IV, V, or VI will permit that to happen is uncertain, but what is certain is that without a viable FON program in the interim, it is not likely to happen at all.

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[39]Coll, p. 117.

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